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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1701

ROBERT E. PARKER, Trustee for
OLYMPIA CONSTRUCTION CO., Bankrupt,
Petitioner,
vs.
KLOCHKO EQUIPMENT RENTAL CO., INC.
MARIO TRUCKING COMPANY,
PRICE BROTHERS COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

A.

THE RULING BELOW IS CONSISTENT WITH THE PREVIOUS LAW ESTABLISHED BY THE UNITED STATES SUPREME COURT.

B.

THE RULING BELOW DOES NOT CONFLICT WITH STATE LAW WHICH HAS NOT DIRECTLY ADDRESSED THE ISSUE.

C.

RULE 35(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE DOES NOT MANDATE A HEARING *EN BANC* TO OVERRULE A PREVIOUS DECISION OF ANOTHER PANEL.

STATUTORY PROVISIONS INVOLVED

MCLA 129.201; MSA 5.2321(1)

(See Appendix A for full text of MCLA 129.201; MSA 5.2321(1))

MCLA 570.101; MSA 26.231

(See Appendix B for full text of MCLA 570.101; MSA 26.231)

MCLA 570.102; MSA 26.322

(See Appendix C for full text of MCLA 570.102; MSA 26.322)

P.L. 95-598, 95th Cong., 2d Sess., §545 and §547

(See Appendix D for full text of P.L. 95-598, 95th Cong., 2d Sess., §545 and §547)

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

We adopt Petitioner's Statement of the case, with the exception of Petitioner's statement on the Court of Appeals holding in *General Insurance Co.* v. *Lamar Corp.*, 482 F2d 856 (6th Cir., 1973):

The Court of Appeals applied the holding of the companion case, *Selby* v. *Ford Motor Co.*, 590 F2d 642 (6th Cir., 1979) and held that "by virtue of the Michigan Builders Trust Fund Act, Michigan Comp. Laws Ann. §570.151 (1966), the funds paid to Schroeder (on the private construction job) were never Olympia's property." The Court also applied the same rationale to the remaining claims arising out of the *public* construction jobs. In so doing, the Court of Appeals overruled its previous decision of *General Insurance Co.* v. *Lamar Corp.*, 482 F2d 856 (6th Cir., 1973) which held the Michigan Builders Trust Fund Act *not* applicable to public construction jobs.

ARGUMENT

A.

THE RULING BELOW IS CONSISTENT WITH THE PREVIOUS LAW ESTABLISHED BY THE UNITED STATES SUPREME COURT.

The Court of Appeals, in its opinion in *Selby* v. *Ford Motor Company*, 590 F2d 642 (6th Cir., 1979), has thoroughly outlined the prior rulings of the Supreme Court to substantiate the validity of its position which has not created any state statute supremacy over the distribution scheme of the Bankruptcy Act. In *Aquilino* v. *United States*, 363 U.S. 509 (1960), a case involving a federal tax lien and New York's builder's trust fund statute, the Supreme Court ruled that property rights, their *creation* and definition are established by state

law. Thus, state statutes creating trusts are valid. The Supreme Court has held that a traditional trust would not be the property of the bankrupt's estate. *Hawkins* v. *Blake*, 108 U.S. 422 (1882); *Perlman* v. *Reliance Insurance Co.*, 371 U.S. 132 (1962); *First National Bank* v. *Staake*, 202 U.S. 141 (1905).

Further, the ruling of the Court below is consistent with the new Bankruptcy Act. As the Court of Appeals details in its opinion in *Selby, supra*, the new Act recognizes statutorily created trusts and places them outside the lien and preference provisions of the new Act. *P.L. 95-598, 95th Cong., 2d Sess.*, §545 *and* §547. The new Act becoming effective as of July 1, 1979 makes petitioner's proposal in Argument A a moot question inasmuch as its adoption would be clearly contrary to the specific provisions of the new Bankruptcy Act.

B.

THE RULING BELOW DOES NOT CONFLICT WITH STATE LAW WHICH HAS NOT DIRECTLY ADDRESSED THE ISSUE.

The application of the Michigan Builders Trust Fund Act, MCLA §570.151; MSA 26.331 (1966), to public construction projects has never been directly ruled upon by the Michigan Courts.

The cases relied upon by petitioner do not represent specific holdings by the Michigan Supreme Court but are merely dicta. In *Club Holding Co.* v. *Flint Citizens Loan & Investment Co.*, 272 Mich. 66, 261 N.W. 133 (1935), the Michigan Supreme Court's finding that the

Trust Fund Act did not provide a civil remedy has been overruled in *B.F. Farnell Co.* v. *Monahan*, 377 Mich. 552, 141 N.W. 2d 58 (1966) by a later Michigan Supreme Court stating: "That is a wrong this Court has perpetrated and now may correct". 141 N.W. 2d at 61. In *National Bank of Detroit* v. *Eames and Brown*, 396 Mich. 611, 242 N.W. 2d 412 (1976), the Court again addressed itself to a private project, not a public project, and referred to the decision of the Sixth Circuit in *General Insurance Company* v. *Lamar Corp.*, 482 F2d 856 (6th Cir., 1973), merely to detail the legislative history of the Act. It did not, as petitioner indicates in his brief, approve of the *General Insurance* case. We are left, therefore, with the *General Insurance* case, *supra*, being the only pronouncement concerning the issue of public projects.

The Court of Appeals in declining to follow its own ruling in *General Insurance* has followed instead the principles of the Michigan Supreme Court detailed in the *Farnell* case:

> (W)henever the law gives a right or prohibits an injury, it will also afford a remedy. Hence, where there has been an injury for which none of the established forms of action will lie, an action on the case may be maintained, it being no objection that there is no precedent for the particular action, since the action is suited to every wrong and grievance that a person may suffer, and varies according to the circumstances of the case. 11 C.J. p. 4". 141 N.W. 2d at 61.

The Court below recognized as illogical that the assumption made in *General Insurance* that materialmen on a public project did not need the benefit of the trust fund because of reliance on the payment bond statute. MCLA 129.201; MSA 5.2321(1); MCLA 570.101; MSA 26.321 (1966). The materialmen in the present case relinquished their "bond rights" by not filing the statutorily required written notice to the surety after receiving the funds in dispute. MCLA 570.102; MSA 26.322. Where timely notice is not given, it has been held that the surety is not liable on its bond. *Holmes* v. *Insurance Company of North America*, 288 F. Supp. 325, 328 (W.D. Mich. 1963), citing *People of Michigan ex rel. F. Yeager Bridge & Culvert Co.* v. *Cooke Contracting Co.*, 372 Mich. 563, 127 N.W. 2d 308, 309 (1964). Thus, it is both illogical and inequitable to follow a rule of law which permits materialmen on private jobs to rely upon the trust fund statute but deny the same protection to materialmen on public projects.

The ruling of the Court below is entirely consistent with the principles of the state courts and not contrary to state law. It has, in fact, filled a void not filled by the state courts, and corrected its previous erroneous decision.

C.

RULE 35(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE DOES NOT MANDATE A HEARING EN BANC TO OVERRULE A PREVIOUS DECISION OF ANOTHER PANEL.

Rule 35(a) of the Federal Rules of Appellate Procedure provides for an *en banc* hearing when "necessary to

secure or maintain uniformity" of the circuit's decisions. Because it is a procedural rule, each circuit should be allowed to implement the rule to meet its particular circumstances and requirements. The Sixth Circuit has not deemed it necessary to implement the procedures of the Third and Fifth Circuits, and the rule itself has not been interpreted to be mandatory but available when determined to be necessary.

The Court below has unanimously stated that *en banc* hearing was not necessary on petitioner's request for rehearing. It is a fair assumption that the Sixth Circuit has decided that Circuit Judge Weick, who had participated in the *General Insurance* case and voted with the majority and now declined to follow that ruling, provided the necessary uniformity and internal stability espoused by petitioner and other circuits.

CONCLUSION

The Court of Appeals has followed the principles of laws as established by the Supreme Court and the state's highest court in determining an issue never previously decided by the state court.

The Court has further provided adequate safeguards under Rule 35(a) by unanimously rejecting the necessity of an *en banc* hearing and by a common member of each panel rejecting his own position in following the majority opinion in this case.

Therefore, petitioner's writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

MCLA 129.201; MSA 5.2321(1)

Before any contract, exceeding $50,000.00 for the construction, alteration or repair of any public building or public work or improvement of the state or a county, city, village, township, school district, public educational institution, other political subdivision, public authority or public agency hereinafter referred to as the "governmental unit", is awarded, the proposed contractor, hereinafter referred to as the "principal contractor", shall furnish at his own cost to the governmental unit a performance bond and a payment bond which shall become binding upon the award of the contract to the principal contractor. Neither the invitation for bids, nor any person acting, or purporting to act, on behalf of the governmental unit shall require that the bonds be furnished by a particular bank or surety company, or through a particular agent or broker, or through a bank, company, agent or broker in any particular locality.

APPENDIX B

MCLA 570.101; MSA 26.231

When public buildings or other public works are about to be built, repaired or ornamented under contract at the expense of the state, or of any county, city, village, township or school district thereof, it shall be the duty of the board of officers or agents, contracting on behalf of the state, county, city, village, township or school district, to require sufficient security by bond for the payment by the contractor of all subcontractors and for the payment for all labor performed and materials and certain [sic] supplies furnished and used in the erection, repairing or ornamenting of such public buildings or works.

APPENDIX C

MCLA 570.102; MSA 26.322

In the case of a subcontractor, he shall within sixty [60] days after furnishing the last material or supplies or performing the last work covered by his subcontract, serve a written notice in duplicate upon the board of officers or agents contracting on behalf of the state, county, city, village, township or school district as aforesaid, that he is a subcontractor for the doing of some part of such work, which he shall specify in his notice and that he relies upon the security of the bond by this act required to be given by the principal contractor, and the said board of officers or agents shall within ten [10] days thereafter furnish a copy of such notice to the sureties for the principal contractor: Provided, however, That if such notice is not furnished by the said board of officers or agents within the said ten [10] days such failure shall in no wise release or impair the obligation of said sureties, and whenever this shall have been done, the said subcontractor shall be entitled, subject to the rights of the persons with whom he has contracted for labor, materials or supplies to the benefit of the security given by the principal contractor, and to be subrogated to the liens of the persons who have performed labor or furnished materials or supplies for such building, repairs or ornamentation, whom he shall have actually paid, but the subcontractor and the persons who shall have performed labor or furnished materials or supplies to him shall not in the aggregate be entitled to receive larger sums that [than] may be required from the principal contractor under his contract with the subcontractor, nor shall this act be construed to change in any way the contract which may have been made

between the principal contractor and the subcontractor, except when such contract shall attempt to relieve the principal contractor as against the demands of those performing labor or furnishing materials or supplies to the subcontractor. All others, excepting those furnishing labor, relying upon the security given by the principal contractor, shall within sixty [60] days after furnishing the last material or supplies, serve a written notice in duplicate upon the board of officers or agents contracting on behalf of the state, county, city, village, township, or school district as aforesaid, that such contractor or subcontractor is indebted to them in a specified amount or for the furnishing of certain specified materials or supplies on account of such contract, and the said board of officers or agents shall within ten [10] days thereafter furnish a copy of such notice to the sureties for the principal contractor: Provided, however, That if such notice is not furnished by the said board of officers or agents within the said ten [10] days such failure shall in no wise release or impair the obligations of said sureties.

APPENDIX D

P.L. 95-598, 95th Cong., 2d Sess., §545

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien —

(1) first becomes effective against the debtor —

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable on the date of the filing of the petition against a bona fide purchaser that purchases such property on the date of the filing of the petition, whether or not such a purchaser exists;

(3) is for rent; or

(4) is a lien of distress for rent.

P.L. 95-598, 95th Cong., 2d Sess., §547

(a) In this section —

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable, including any extension, without penalty.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor —

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer —

(i) was an insider; and

(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer —

(1) to the extent that such transfer was —

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was —

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made not later than 45 days after such debt was incurred;

(C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(D) made according to ordinary business terms;

(3) of a security interest in property acquired by the debtor —

(A) to the extent such security interest secures new value that was —

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected before 10 days after such security interest attaches;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) of a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferree caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interest for such debt on the later of —

(A) (i) with respect to a transfer to which subsection (b) (4) (A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b) (4) (B) of this section applies, one year before the date of the filing of the petition; and

(B) the date on which new value was first given under the security agreement creating such security interest; or

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title.

(d) A trustee may avoid a transfer of property of the debtor transferred to secure reimbursement of a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e) (1) For the purposes of this section —

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made —

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —

(i) the commencement of the case; and

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.